



Nyiera v Osago (Civil Appeal E005 of 2024) [2025] KEHC 8813 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8813 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E005 OF 2024**

DK KEMEL, J

JUNE 20, 2025

BETWEEN

JOSEPH OYUGI NYIERA APPELLANT

AND

JENIPHER OKUMU OSAGO RESPONDENT

((Being an appeal against the whole judgement and orders of Hon. JP Nandi (PM) in Succession Cause No. 107 of 2017 at Bondo PMCC delivered on the 13th day of April 2023))

JUDGMENT

1. The appeal arises from the whole judgement and orders of Hon. JP Nandi (PM) in Succession Cause No. 107 of 2017 at Bondo PMCC delivered on the 13th day of April 2023 wherein he ordered the estate of the deceased comprising of Parcel No. South Sakwa/Migwena/245 be distributed and that the Appellant herein was allocated 0.83 Ha thereof while the Respondent was allocated 3.77 Ha thereof.
2. Aggrieved by the said judgment the Appellant filed his Memorandum of Appeal dated 15/6/2024 wherein he raised the following grounds of appeal.
 1. That the learned magistrate erred in law and fact by leaving out identified dependants to the deceased's estate to wit; Joshua Nyiera, George Osewe Nyiera and Kevin Okoth Nyiera regarding the deceased's estate known as South/Sakwa/Migwena/245 within the applicable law.
 2. That the learned magistrate erred in law and fact by failing to exercise his discretion to ensure that the deceased's estate known as South Sakwa/Migwena/245 being an ancestral land was fairly and equitably distributed within the applicable law to all dependants as identified.
 3. That the learned magistrate erred in law and fact by failing to consider the equitable interest by all beneficiaries regarding ancestral land and constructive trust therein thus leading to improper distribution of the deceased's estate being South Sakwa/Migwena/245.



4. That the learned magistrate erred in law and fact by failing to consider national values and principles of good governance when issuing orders that rendered the other beneficiaries landless.

The Appellant therefore prays that the appeal be allowed and that the whole ruling and order of the court delivered on the 13/3/2023 by Hon. JP Nandi, at Bondo Principal Magistrate's Court in Succession Cause No. 107/2017 be set aside and that the appellant be allowed with costs.

3. This being the first appellate court, its duty is to re-evaluate the evidence tendered before the lower court and subject it to an independent analysis and to arrive at its own independent conclusion as to whether or not to uphold the decision of the lower court. See *Selle Vs. Associated Motor Boat Company Limited* [1968] EA 123.

4. It is noted that the trial court was tasked with summons for confirmation of grant dated 26/4/2022 and that the trial court had the rival sentiments of both the Appellant and the Respondent who gave the evidence on oath and cross examined regarding the proposed mode of distribution of the property of the deceased, arrived at the decision now appealed against.

The Respondent Jenipher Okumu Osago testified that the deceased was her biological father who owned LR No. South Sakwa/Migwena/245. That the Appellant and his siblings have their parcel of land South Sakwa Migwena/248 where they reside together with their mother Consolata Okunda. On cross examination, she stated inter alia; that the deceased was her father; that the Appellant is a son to her uncle; that it is true that she and the Appellant had filed an application to substitute the deceased's Petitioner; that the Appellant should get 0.83 Ha out of Parcel No. 245 and not 255 as indicated in her supporting affidavit.

The Appellant testified inter alia; that he is a retired civil servant; that he knows the Respondent very well since they are related; that they stay on parcel 245; that his brothers should be given a place to stay as they are staying on the suit land. On cross examination, he stated inter alia; that the late Christine Juma Osago has suggested a mode of distribution but that he is not aware if the same was revoked; that his brothers are not biological sons of the deceased herein; that his real mother passed on while Consolata is the wife of his uncle; that his father did not have any land in his name; that he has not brought anything to show that his brothers are living on the suit land; that Jenipher Okumu Osago, Francisca, Antonina Osago and Beatrice Osago are the only surviving children of the deceased.

5. The parties agreed to canvas the summons for confirmation of grant by way of written submissions. The parties duly filed and exchanged submissions.
6. The trial court considered the application plus the submissions and arrived at the judgment now appealed against.
7. This appeal was canvased by way of written submissions. Both parties filed and exchanged submissions.
8. Appellant's submissions are dated 28/2/2025.
9. The Appellant submitted that the deceased died intestate and that at the time, land parcel being South Sakwa/migwena/245 an ancestral land was registered in the deceased's name. That the Appellant is aggrieved by the fact that on the 13th of April, 2023, the trial court proceeded to order distribution of the deceased's parcel of land in total disregard to the applicable law and to all dependents as had been identified.



It was submitted that the lower court took it upon itself to ignore some of the dependents as had been identified and purported to proceed with distributing the deceased's estate contrary to the information that was before it and thus abrogating its paramount task as required under Section 71(1) of the Law of Succession Act, Cap 160 Laws of Kenya when faced with confirmation of grant.

10. It is the appellant's submission that the duty under confirmation of grant is not just about approving a distribution proposal regarding a deceased's estate in the manner it did, but a duty which calls upon the court to consider the duties of the administrators under Section 83 of the Law of Succession Act, to wit providing the court and rendering an account of all the dependents, assets and liabilities of the deceased's estate to enable the trial court appreciate the deceased's estate preceding the confirmation of grant. That was never done by the subordinate court, to the contrary, the court proceeded to issue a ruling on confirmation of grant.
11. In the present case, there are two administrators to the deceased's estate with the Appellant being one of them which means that the duty to properly govern the deceased's estate lies with both the administrators and as such none could purport to be acting as an individual in the manner the objector did at the subordinate court and who has now proceeded to subdivide the deceased's estate unilaterally.
12. It was submitted that under the law, the subordinate court was enjoined by the Constitution and the Succession Act to hear the summons before the confirmation of grant. The court ignored that fundamental duty. The proceedings indeed will reveal that the trial court never inquired about all the beneficiaries, the court ignored to find out the deceased's asset's nature and its occupation regarding the mentioned beneficiaries and any liabilities thereto if any. That was contrary to the law, unprocedural and as such ought to be set aside. The appellant therefore faults the Magistrate for failing to adhere to the laid down principles that the court should follow before confirming a grant.
13. Further, it was submitted that the trial court never took into account the evidence that the Appellant was one of the administrators to the deceased's estate but that it treated the objector as a superior administrator by rubber stamping what she indicated to the court and treated the same as the law.
14. It was also submitted that the manner in which the court proceeded to confirm the grant has now in effect rendered some of the beneficiaries to the deceased's estate landless when it has the benefit to consider the two-competing summons for confirmation as had been proposed by the appellant and the objector by calling all the parties to appear before it to avoid falling on the error it did. That had the trial court called all the parties for the hearing of the summons for confirmation of grant, it would have discovered that the deceased had let some of the beneficiaries settled on the land and as such would not have proceeded to rule in the manner it did.
15. Finally, learned counsel for the Appellant implored the court to find that the decision of the lower court was not sound and not within the applicable law as far as confirmations of grant is concerned and hence the court should interfere with the same and allow this appeal.
16. The Respondent's submissions are dated 18/3/2025.
17. The Respondent's counsel gave a history of the matter which was that the matter before the lower court was commenced by a petition for letter of administration intestate vide Bondo Principal Magistrate's Court Succession cause number 107 of 2017 by one Christina Juma Osago the Petitioner the wife to the deceased Remjius Osago Ouma Alias Remjius Osago who died on the 10/4,1996.
18. It was submitted that from the the chief's letter dated 19/12/2016, the same clearly shows the deceased Remjius Osago Ouma Alias Remjius Osago had two wives namely Isabella Abayo Osago (deceased)



and Christina Juma Osago. That Isabella Abayo Osago (deceased) had three children namely Antonina Osago, Jenipher Okumu Osago and Monica Agala Osago .

19. Further, it was submitted that sometimes on the 27/09/2023, the Appellant herein and Jenipher Okumu Osago (Respondent) moved the honourable trial court to substitute Christina Juma Osago, the administratrix vide Chamber summons dated 6th September 2023 who had since as seen at pages 20-22 of the record of appeal.

From Page 23 of the record of appeal is a replying affidavit dated by the Appellant that shows the Respondent Jenipher Okumu Osago filed summons for revocation of grant that is not annexed to the record of appeal herein. However, your Lordship, a look at the lower court typed proceedings page 53 the last paragraph indicates Mr. Okello advocate filed summons for revocation of grant dated 9.6.2021 under certificate of urgency.

20. That the appellant herein has intentionally left out and/ or expunged from record of appeal pages 7,8,9 10 of the lower court proceedings as shown by Pages 56 and 57 of the record of appeal for reasons and particulars better known to them. They have left the court guessing and it is our submission that the said pages 7, 8, 9 10 of the lower court proceedings are unfavourable to their case.

21. It was further submitted that notwithstanding the trial court proceeded on 26.01.2023 to hear parties on the mode of distribution as shown at Page 60 of the Record of appeal and that the Respondent was very clear when she stated “I do not agree with the mode of distribution proposed by the petitioner. They have their land belonging to their mother Conslata Okunda which is parcel number 248. Their mother is still alive. Joshua's house is on parcel 248.”

On cross examination, the Respondent testified that the Appellant should get 0.83 HA out of parcel 245 and not 255 as indicated in her supporting affidavit. The Respondent closed her case.

That when it came to the Appellant's case, he testified during cross examination as follows at page 62 of the Record of Appeal: -

“The late Chritine Juma Osago suggested a mode of distribution but I am not aware if the said mode of distribution was revoked. My brothers are not biological sons of the deceased herein. My real mother passed on while Conslata is the wife of my uncle. My father did not have any land in his name.

I have not brought anything to show that my brothers are living on the suit land. Jenipher Okumu, Fransisca, Antonina Osago and Beatrice Osaga are the only surviving children of the deceased”

Further, it was submitted that it is on the basis of this admission by the Appellant that his brothers namely Joshua Nyiera, George Osewe Nyiera & Kevin Nyiera are not biological sons of the deceased herein that the Honourable trial court went ahead to hold:-

12. Having considered the evidence on record and submissions filed, I hereby find that the parties are in agreement on the mode of distribution that Joseph Oyugi Nyiera should get 0.83Ha out of parcel South Sakwa/Migwena/245. His brothers did not participate in this proceeding and it came out clearly that they are not the deceased's children and thus they are not entitled to a share of the deceased's estate.
13. In conclusion parcel South Sakwa/Migwena/245 is hereby distributed as follows:
 - a. Joseph Oyugi Nyiera.....0.83Ha



b. enipher Okumu Osago., Fransisca Antonina Osago & Beatrice Ouma Osago...3.77Ha jointly in equal share.”

22. It was submitted that the Appellant’s brothers namely Joshua Nyiera, George Osewe Nyiera & Kevin Nyiera are not biological sons of the deceased herein Remjius Osago Ouma alias Remjius Osago (deceased) hence are not entitled to any share of his estate.
23. I have considered the record of appeal and the submissions of the learned counsels. It is not in dispute that the duty of any succession court is to distribute the free property of a deceased person to his/her dependants. It is not in dispute that the parties herein had lodged summons for confirmation of grant and that during the hearing of the said summons, the parties were given an opportunity to address the court regarding their views over the proposed schedule of distribution of the estate and who were duly cross-examined. It is not in dispute that an earlier summons for revocation of grant was determined by the trial court and that the Appellant and the Respondent were directed to proceed and file summons for confirmation of grant together with their proposed mode of distribution. It is also not in dispute that the parties were given an opportunity to ventilate their rival views regarding how the estate of the deceased comprised in land Parcel South Sakwa/Migwena/245 was to be distributed. It is also not in dispute that the Appellant is not a biological child of the deceased as he confirmed on cross examination that he together with his brothers were not biological sons of the deceased and that the Respondent and three of her sisters were the only surviving children of the deceased. It is also not in dispute that the trial court distributed the estate of the deceased in accordance with the evidence received from both the Appellant and the Respondent. That being the position, I find the issue for determination is whether the appeal has merit.
24. It is noted that the trial court considered the summons for confirmation of grant dated 26/4/2022 which pitied the Appellant against the Respondent over the manner in which the only property of the deceased namely South Sakwa/Migwena/245 was to be distributed. The trial court received oral evidence from both of them and who were cross examined at length by their respective advocates and come up with the impugned judgment. The Appellant has taken great exception at the trial court for ignoring the fact that there were other dependants or beneficiaries or the occupation in the land and further failed to call all the family members to appear in court and give evidence. However, it is clear that from the evidence presented, the Appellant and his brothers were not the children of the deceased. The Appellant himself admitted on cross examination that the Respondent and three of her sisters were the only surviving children of the deceased. Hence, upto that point, the Respondent and her siblings were the ones who rank in priority regarding the distribution of the estate of their late father. The Appellant has attempted to introduce the doctrine of trust wherein he claimed that the deceased held the land in trust for other family members. However, he did not present any iota of evidence to support that assertion. It is instructive that the Appellant did not deem it necessary to invite his brothers or other family members to come forward and register a protest to the confirmation. This was not done and therefore he gave the impression that it was only himself and the Respondent who mattered in the distribution of the estate.
25. Learned counsel for the Respondent in his submissions, has pointed out the fact that the Appellant in this appeal has deliberately avoided the fact that he had testified before the trial court over the issue of the distribution. I have perused the lower court record and note that the trial court proceeded on



26.01.2023 to hear parties on the mode of distribution as shown at Page 60 of the Record of appeal and that the Respondent was very clear when she stated:

“I do not agree with the mode of distribution proposed by the petitioner. They have their land belonging to their mother Conslata Okunda which is parcel number 248. Their mother is still alive. Joshua's house is on parcel 248.”

On cross examination, the Respondent testified that the Appellant should get 0.83 HA out of parcel 245 and not 255 as indicated in her supporting affidavit. The Respondent closed her case.

The Appellant in his evidence, during cross examination as seen at page 62 of the Record of Appeal was as follows:

“The late Chritine Juma Osago suggested a mode of distribution but I am not aware if the said mode of distribution was revoked. My brothers are not biological sons of the deceased herein. My real mother passed on while Conslata is the wife of my uncle. My father did not have any land in his name.

I have not brought anything to show that my brothers are living on the suit land. Jenipher Okumu, Fransisca, Antonina Osago and Beatrice Osaga are the only surviving children of the deceased”

The learned trial magistrate was persuaded by the evidence of the Respondent as well as the admission by the Appellant that his brothers namely Joshua Nyiera, George Osewe Nyiera & Kevin Nyiera are not biological sons of the deceased herein that he went ahead to hold:-

“ 12. Having considered the evidence on record and submissions filed, I hereby find that the parties are in agreement on the mode of distribution that Joseph Oyugi Nyiera should get 0.83Ha out of parcel South Sakwa/Migwena/245. His brothers did not participate in this proceeding and it came out clearly that they are not the deceased's children and thus they are not entitled to a share of the deceased's estate.

26. In conclusion parcel South Sakwa/Migwena/245 is hereby distributed as follows:

- a. Joseph Oyugi Nyiera.....0.83Ha
- b. Jenipher Okumu Osago., Fransisca Antonina Osago & Beatrice Ouma Osago...3.77Ha jointly in equal share.”

27. Having critically considered the evidence of the Appellant and the Respondent as well as the finding by the learned trial magistrate, I am satisfied that the evidence presented by the Respondent was quite overwhelming and further backed up by the Appellant's own admission that the deceased was not his father. Even though the Appellant has tried to bring up the issue of trust, I find that he did not convince the trial court that the deceased held the property in trust for him or any other persons. Indeed, the Appellant bore responsibility of inviting witnesses who would back his claim. In any event, the Appellant could still have approached the relevant court and agitate his claim regarding the doctrine of trust. As the Respondent proposed that the Appellant though not a child of the deceased be given 0.83 Ha, the Appellant should consider himself lucky since it transpired from the evidence that his family has their own land namely South Sakwa /Migwena /248. Consequently, the finding by the trial court was quite sound and must be upheld.



28. In view of the foregoing observations, it is my finding that the Appellant's appeal lacks merit. The same is dismissed. Each party to bear their own costs.

DATED AND DELIVERED AT SIAYA THIS 20TH DAY OF JUNE, 2025

D. KEMEI

JUDGE

In the presence of:

Oduol.....for Appellant.

N/A Alego.....for Respondent.

Achieng.....Court Assistant.

